

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2012AP2525
2012AP2526**

**Cir. Ct. Nos. 2012TP3
2012TP4**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 2012AP2525

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO NADIA F.,
A PERSON UNDER THE AGE OF 18:**

PIERCE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TROY H.,

RESPONDENT-APPELLANT.

No. 2012AP2526

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
HUNTER F.-H., A PERSON UNDER THE AGE OF 18:**

PIERCE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TROY H.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Pierce County:
JOSEPH D. BOLES, Judge. *Reversed and causes remanded with directions.*

¶1 MANGERSON, J.¹ Troy H. appeals orders terminating his parental rights to his children, Nadia F. and Hunter H.-F. Troy argues the circuit court erroneously exercised its discretion by determining termination was in his children's best interests. We agree and reverse and remand with directions.

BACKGROUND

¶2 On February 15, 2012, the Pierce County Department of Human Services petitioned to terminate Troy's parental rights to Nadia and Hunter.² As grounds for termination, the petitions alleged that Nadia and Hunter continued to be children in need of protection or services. *See* WIS. STAT. § 48.415(2). Troy contested the petitions and requested a fact-finding hearing to the court.

¶3 After the fact-finding hearing, the circuit court found that grounds existed to terminate Troy's parental rights. Specifically, the court determined that Troy was ordered to complete certain conditions for the children to return to his care, the County had made reasonable efforts to provide services ordered by the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² The children's mother is deceased.

court, and Troy failed to complete the conditions for return. The court also found that, based on the witnesses' testimony, there was a substantial likelihood that Troy would not be able to meet the conditions for a safe return within the next nine months. The court then scheduled a dispositional hearing.

¶4 Before the dispositional hearing, a county social worker submitted two reports to the court, one regarding Nadia and the other regarding Hunter, that opined it was in the children's best interests to terminate Troy's parental rights. The social worker also testified about her opinions at the dispositional hearing.

¶5 The County and the children's guardian ad litem argued it was in the children's best interests for the court to terminate Troy's parental rights. Troy asked the court to dismiss the County's petitions. The court then terminated Troy's parental rights, reasoning:

And now the time comes when we must look at what's best for the kids' long run, and I do believe that the requirement for stability, a stable, consistent, good, solid home is what they need and what they deserve. And even though it's not [Troy's] fault, [Troy is] not able to give that to them.

And I feel – I understand the heartbreak, but the fact is, the tide is different in this hearing and it really is the focus on the children now. And clearly, it is in their best interest that [Troy's] parental rights be terminated so the goal, the permanency plan goal, of adoption can be pursued before these children get any older.

And that is one of the problems. One of the reasons the law is as it is, is because years ago, not too many years ago, these cases would be in limbo until the children were of age and they never would get a home. And even though you're not able to provide that home, [Troy], I'm hoping that you'll appreciate the home that they do have, the both safe and solid support that they're getting in helping them grow up as productive teenagers and productive adults as they go through the rest of their minor years.

And so I do find that it is in the children's best interests that your ... parental rights be terminated, [Troy], and I hereby do terminate your parental rights.

DISCUSSION

¶6 The procedure for involuntary termination of parental rights is a two-step process. *Sheboygan Cnty. DHHS v. Julie A. B.*, 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402. During the first or “grounds” phase, the fact-finder determines whether one of the statutory grounds exists to terminate a parent's rights. *Id.*, ¶26. If a ground is established, the parent is found unfit and the proceeding moves to the second phase, or dispositional hearing. *Id.*, ¶¶26, 28.

¶7 On appeal, Troy challenges only the dispositional hearing. At a dispositional hearing, the circuit court determines whether it is in the child's best interest to terminate the parent's rights. *Id.*, ¶28. This determination is within the circuit court's discretion. *Brandon S. S. v. Laura S.*, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). However, when exercising its discretion, the circuit court must consider the six factors enumerated in WIS. STAT. § 48.426(3) on the record. *State v. Margaret H.*, 2000 WI 48, ¶35, 237 Wis. 2d 606, 610 N.W.2d 475. Specifically, the court must consider:

- (a) The likelihood of the child's adoption after termination.
- (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
- (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
- (d) The wishes of the child.
- (e) The duration of the separation of the parent from the child.

(f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

WIS. STAT. § 48.426(3).

¶8 Troy asserts the circuit court erroneously exercised its discretion because the record shows that the court did not consider any of the WIS. STAT. § 48.426(3) factors when determining it was in the children's best interests to terminate his parental rights. The County, relying on *Julie A. B.*, 255 Wis. 2d 170, ¶30, responds that the court sufficiently "alluded" to the § 48.426(3) factors because the County presented evidence that would support termination based on the factors. *See Julie A. B.*, 255 Wis. 2d 170, ¶30 ("The court should explain the basis for its disposition, on the record, by alluding specifically to the factors in ... § 48.426(3) and any other factors that it relies upon in reaching its decision.").

¶9 We reject the County's argument. That the County presented evidence that could support the court's determination does not mean that the court, when explaining its determination, "allud[ed] specifically to the factors in ... WIS. STAT. § 48.426(3)." *See Julie A. B.*, 225 Wis. 2d 170, ¶30. Further, in *Margaret H.*, our supreme court stated that "the record should reflect *adequate consideration of* and weight to *each* factor" listed in § 48.426(3). (Emphasis added.) Here, nothing reflects that the court considered the § 48.426(3) factors when determining it was in the children's best interests to terminate Troy's parental rights.

¶10 Moreover, the evidence the County presented in support of termination was not uncontroverted. For example, although the social worker opined that the children did not have a substantial relationship with Troy, which

would go to the WIS. STAT. § 48.426(3)(c) factor, Troy disputed how the worker arrived at that opinion and the record reflects that the children lived with Troy for a period of time after their mother's death. Specific to this example, the circuit court did not then consider any relationship the children had with Troy before determining it was in the children's best interests to terminate Troy's parental rights.

¶11 As a result, we conclude the circuit court erroneously exercised its discretion by failing to give consideration and weight to each WIS. STAT. § 48.426(3) factor when determining whether it was in the children's best interests to terminate Troy's parental rights. *See Margaret H.*, 237 Wis. 2d 606, ¶35. We therefore reverse and remand to the circuit court for a proper dispositional hearing. At the dispositional hearing, the court need not hear the same evidence again and may, in its discretion, take additional evidence. However, the court must consider on the record all the factors enumerated in § 48.426(3) to determine whether it is in the children's best interests to terminate Troy's parental rights.

By the Court.—Orders reversed and causes remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

